No. 02-1321

Supreme Court, U.S.
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IN THE

United States Supreme Court

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of the City of New York and individually, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York and individually, *et al.*,

Petitioners,

against

PATROLMEN BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS TAI AND ROBERTSON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS BELOW

THE CITY OF NEW YORK, RUDOLPH GIULIANI, as Mayor of the City of New York and individually, HOWARD SAFIR, as Police Commissioner of the Police Department of the City of New York and individually, PATRICK BRENNAN, New York City Deputy Police Chief Officially and Individually, CORNELIUS J. DEVER, Deputy Police Chief, Officially and Individually and MICHAEL A. MARKMAN, Chief, Officially and Individually,

Petitioners.

PATROLMEN BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INCORPORATED for itself and on behalf of its members, GARY JOHNSON, Police Officer, MISSIE LEWIS-MANNING, Police Officer, ROBERT DRAYTON, Police Officer, MARVA GARDNER, Police Officer, and DEMETRIA SINGLETON, Police Officer, MARGO MCKENZIE, Police Officer, ROBERT WINSLOW, Police Officer, KENNETH ZEPHERIN, Police Officer, OSCAR ESPINAL, Police Officer, DAVE GUEVERA, Police Officer, PEGGY ALVES, Police Officer, ROBIN IRVIN, Police Officer, SILAS PLUNKETT, Police Officer, RONNY FORBES, Police Officer, ALTON WALKER, Police Officer, BARRY HINDS, Police Officer, TSELANEE KITCHING, Police Officer, LAVERNE STUGER, Police Officer, MICHAEL BUTLER, Police Officer, CAROLE P. SIEVWRIGHT, Police Officer, INGER BARRON, Police Officer, and RONALD S. ARCHER, Police Officer, SERGEANT'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., for itself and on behalf of its members PHILIP TAI and JOHN S. ROBERTSON,

Respondents.

TABLE OF CONTENTS

	Page
Parties to the Proceedings Below	i
Table of Authorities	iii
Counter-Statement of Facts	1
A. The Motion for Summary Judgment	2
B. The Trial	3
Reasons for Denying the Writ	6
A. The Record Does Not Raise the Questions Presented	6
B. The Decision Below Was Correct	8
Conclusion	11

TABLE OF AUTHORITIES

Cases: *Page*

Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970) 10

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 9

Askew v. Hargrave, 401 U.S. 476 (1971) 9

Carey v. Piphus, 435 U.S. 247 (1978) 7

Kennedy v. Silas, 334 U.S. 249 (1948) 9

Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 7

Perry v. Sinderman, 408 U.S. 593 (1972) 9

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 9

Simblest v. Maynard, 427 F.2d 1 (2nd Cir. 1970) 9

U.S. v. Diebold, Inc., 369 U.S. 654 (1962) 10

COUNTER-STATEMENT OF FACTS

In November 1998 Respondents Philip Tai and John S. Robertson, sergeants in the New York City Police Department, filed suit in the United States District Court for the Southern District of New York alleging civil rights violations by the Petitioners City of New York, its Mayor, and various high-ranking members of the New York City Police Department. In substance the complaint alleged that the defendants had "transferred [Respondents'] place of employment solely due to their race." The complaint describes Tai and Robertson as "African American."

While Petitioners now assert that Respondents complained about "the City's consideration of their race in transferring them," (Pet. 3), in fact Respondents complained that race was the *sole* consideration in the transfers. As the District Judge noted, "Defendants do not dispute that race was the basis for the transfer decision." (Pet. App. at B28); *see also*, Pet. App. at B66 ("defendants conceded that the transfers were based solely on race"). The transfers were made after the August 9, 1997 assault of a black male (Abner Louima) by a white officer in the 70th Police Precinct in Brooklyn, New York. It is undisputed that the transfers were involuntary. (Pet. App. at B28, B33).

The complaint alleged causes of action under 42 U.S.C. §§ 1981, 1983, and 1985; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.*; and various state and city laws. The complaint sought injunctive relief as well compensatory damages. (Pet. App. at B28).

For purposes of pretrial and trial proceedings, the Respondent-sergeants' action was consolidated with an

action filed previously by black officers who also had been involuntarily transferred into the 70th Precinct.

A. The Motion for Summary Judgment

The parties moved and cross-moved for summary judgment or partial summary judgment.

Noting that "Defendants do not dispute that race was the basis for the transfer decision[,]" (Pet. App. at B28),[1] the District Judge concluded that under Equal Protection case law such race-based transfers are subject to strict judicial scrutiny, which means the transfer must promote a compelling governmental interest and be narrowly tailored to meet that interest. Pet. App. at B34-35.

The court accepted Petitioners' position that the "operational needs" of a police department could constitute a compelling state interest. While the need to integrate a police force and make up for past employment discrimination can constitute a compelling state interest, the District Judge noted that the Petitioners "do not rely on the theory of past discrimination to justify their operational needs defense." Pet. App. at B36. Instead, Petitioners argued, and the court accepted, that a compelling state interest can be established by the need to provide effective law enforcement, in the face of an otherwise hostile community, by creating a racially diverse police force. *Id.*

The court further concluded, however, that this "operational needs" defense was a matter for proof at trial, and

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[1] The opinion is reported at 74 F. Supp.2d 321 (S.D.N.Y. 1999).

was not appropriate for resolution by way of summary judgment:

> "However, defendants bear the burden of proving at trial that this compelling state interest actually existed in light of the circumstances in the 70th Precinct during and after August 1997. Thus, in order to prevail on this defense, defendants must demonstrate, at trial, that community hostility towards the NYPD following the Louima incident compromised the goal of effective law enforcement and that race-based transfers would restore that goal." *Id.* at B41.

In support of its conclusion that a trial was required, the court noted in detail that the submissions of the parties showed a sharp factual dispute regarding whether "the potential for violence was as serious as that described by the defendants." *Id.* at B41 n.9.

B. The Trial

At trial Petitioners maintained that the horrendous Louima assault threatened the community's peace and security because there was "the imminent potential for civil unrest," and that community leaders had called for the assignment of officers to the precinct with a closer relation to the ethnic and racial makeup of the community. Pet. at 13.[2] As the District Judge and the Second Cir-

[2] Even the racial composition of those living in the 70th Precinct was in dispute at the trial and was a factual issue for the jury. When asked the black population of the 70th Precinct the police commissioner testified, "I'm not sure, but I think it's in the 80's." (JA. 472). Petitioner repeats this 80% figure as fact. Pet. at 4, 7, 17. But the census figures introduced at trial show that the precinct population is 38.2% white, 40.5% black, 14% Hispanic, and 7.3% Asian. (Pl. Ex. 65, JA. 1300).

cuit found, however, there was ample evidence for the jury to find otherwise.

For example, while Petitioners maintain there was "on-the-ground confirmation" of the police commissioner's assertion that he was faced with imminent violence, Pet. at 20, the Second Circuit noted that the contrary testimony of police officials indicated there was no rioting, looting, or other violence in the 70th Precinct after the Louima incident. (Pet. App. at B8, B17). Indeed, the police commissioner testified that he ordered the race-based transfers without even reading the reports of his own community affairs officers which indicated there was no unrest in the community. (JA.458).[3]

Similarly, while Petitioner maintained that the community wanted black officers transferred into the precinct, City Councilwoman Una Clarke, who represented the part of Brooklyn which includes the 70th Precinct, testified that when she met with the commissioner and other city officials she never called for raced-based transfers of officers into the precinct. Pet. App. at B7. In fact, as the Second Circuit observed, the evidence showed that the black officers transferred into the precinct "endured frequent insults and epithets from community members angry about the Louima assault." Pet. App. at B8.[4] As the Second Circuit further noted, while the Commissioner testified there was an urgent need to respond to the threat of violence, the jury could find this claim of urgency

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[3] "JA." refers to the Joint Appendix filed with the Second Circuit.

[4] As one of the plaintiffs testified, if the community wanted black officers, "[T]hey didn't show it while I was there." (Irvin, JA.388).

belied by the evidence that the race-based transfers were made through ordinary personnel channels and took weeks to effectuate. Pet. App. at B17-18. There was also conflicting expert testimony whether race-based transfers were appropriate.

With matters of credibility and fact in sharp dispute, the District Judge instructed the jury that the defendants had raised an "operational needs" affirmative defense, and as a matter of law "operational needs" can provide a compelling state interest justifying a race-based classification. (JA.1132).

The court further instructed the jury that "operational needs" means

> "a law enforcement agency's need to carry out its mission effectively, with a work force that appears unbiased, is able to communicate with the public and is respected by the community it serves. Put another way, a police department has a compelling state interest in maintaining effective law enforcement and public safety within the community it serves." (JA.1132).

This was the jury charge requested by the Petitioner, and the Petitioner took no exception to it.

The judge also submitted written questions to the jury, one of which read:

> *Question Two, Operational Needs:* "Did defendants prove, by a preponderance of the evidence, that the transfer of plaintiffs into the 70th Precinct based on their race was necessary to maintain effec-

tive law enforcement and to ensure public safety in the wake of the Louima incident?"

Petitioners took no exception to the question. The jury answered this question "No." (JA.1195-1196).

Finally, with respect to emotional distress damages for a violation of 42 U.S.C. § 1983, the Second Circuit concluded that the District Judge's charge was proper. Pet. App. at B23-24. Before the District Court and the Second Circuit Petitioners had argued that emotional distress damages could not be awarded unless the distress was corroborated by physical symptoms of the distress. They conceded that Respondents Tai and Robertson, as well as seven other Respondents, produced evidence of physical symptoms. (App. Brief Second Circuit 73).[5] In Question Two Petitioner raises the new issue of whether corroboration of emotional distress must be presented by someone other than the plaintiff himself. Pet. at 23.

REASONS FOR DENYING THE WRIT

A. The Record Does Not Raise The Questions Presented.

Petitioners were sued by respondent police officers under 42 U.S.C. § 1983 and other statutes for making uniformed police officer assignments to a Brooklyn, New York, precinct based solely on the race of the officers.

Petitioners conceded throughout the proceedings in the District Court and the Second Circuit that the assign-

[5] A similar concession was made at oral argument before the Second Circuit.

ments were "raced based." For a defense, Petitioners requested that the District Judge charge the jury that such raced-based assignments are justified when they meet the "operational needs" of a police department, i.e. under the exigent circumstances of a given case raced-based assignments can serve a compelling state interest in maintaining effective law enforcement and public safety.

The District Judge charged the operational needs defense precisely as requested by Petitioners and without objection by the Petitioners. The District Judge also submitted to the jury a question asking whether the Petitioners proved by a preponderance of the evidence that the race-based assignments were necessary to maintain effective law enforcement and to ensure public safety in the circumstances of this case. Petitioners did not object to the question submitted to the jury.

The jury answered the question "No." In short, the jury determined that the Petitioners did not prove their "operational needs" defense.

Question One, therefore, assumes as a fact a matter explicitly rejected by the jury: that the petitioner police commissioner made the race-based assignments to "quell the possibility of civil unrest and violence and to demonstrate to the community the [Police] Department's intent to engage in effective unbiased law enforcement."

It is, therefore, not clear exactly what Petitioners want this Court to decide. The case was submitted to the jury precisely in accordance with the instructions requested by the Petitioners regarding their "operational needs" defense. The jury explicitly concluded that the Petitioners did not prove their defense. Petitioners do not dispute,

as the District Court and the Second Circuit found, that the evidence reasonably supports the jury's determination. Pet. at B17-18, B19, B66.

Similarly, the record does not raise Question Two. Petitioners ask this Court to decide whether a jury can award identical emotional distress damages to all plaintiffs in a § 1983 where the award is "based exclusively on plaintiffs' subjective testimony." It is settled that emotional distress damages can be awarded under § 1983, *Carey v. Piphus*, 435 U.S. 247 (1978), and that an actual injury under § 1983 includes personal humiliation and mental anguish and suffering. *Memphis Community School District v. Stachura*, 477 U.S. 299, 307 (1986). Question Two, however, fails to raise a viable claim on this record.

First, Petitioners cite nothing inherently wrong with a jury awarding identical emotional distress damages to each plaintiff. The testimony of each plaintiff showed that each suffered the same harm: the humiliation of being singled out solely on the basis of race for an unwelcome and distressing assignment when the record showed the New York City Police Department had never before made such race-based assignments, and when the record showed that every high ranking police official—including the police commissioner—testified that the race of an individual is not relevant to his effectiveness as a uniformed police officer.

Second, under Question Two Petitioners ask this Court to decide whether emotional distress damages can be established on the basis of the testimony of the plaintiff alone. (Pet. at 23). Whether proof of an actual injury of emotional distress requires some sort of two-witness rule is not raised by the record in this case. In the District

Court and in the Second Circuit Petitioners argued that a party cannot recover for emotional distress under § 1983 unless there are physical symptoms of the emotional distress. Indeed, Petitioners conceded before the Second Circuit that Respondents Tai and Robertson and seven others presented evidence of physical symptoms. The Second Circuit concluded that a jury can award emotional distress damages without proof of physical symptoms of the distress. Pet. App. at B24. Question Two, therefore presents matters neither raised nor considered below.

B. The Decision Below Was Correct

The District Judge denied Petitioners' motion for summary judgment pursuant to Fed.R.Civ.P. 56(c), and at the close of the later trial denied Petitioners' motion pursuant to Fed.R.Civ.P. 50 for a directed verdict. For two reasons these rulings were correct, and were properly upheld by the Second Circuit.

First, this is a complicated case involving important public interests and important questions of constitutional law. In such a setting summary judgment is particularly inappropriate. *Kennedy v. Silas*, 334 U.S. 249, 257 (1948) (summary procedures present a "treacherous record for deciding issues of farflung import"); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Askew v. Hargrave*, 401 U.S. 476, 479 (1971). As the District Judge observed, Petitioners were not claiming their race-based decision was designed to remedy past discrimination by a police department. Pet. App. at B35. The novelty and importance of Petitioners' "operational needs" defense required a full evidentiary record.

Second, on this record judgment as a matter of law plainly was not warranted.

The standard for ruling on motions for summary judgment and motions for a directed verdict mirror each other. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Thus, a verdict must be directed "if under the governing law, there can be but one reasonable conclusion as to the verdict. . . . If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id.* at 250-251. The matter must be "so one-sided that one party must prevail as a matter of law." *Id.* at 252. There must be, in other words, "but one conclusion" as to the verdict. *Simblest v. Maynard*, 427 F.2d 1, 4 (2nd Cir. 1970).

The same standard applies to motions for summary judgment under Fed.R.Civ.P. 56(c): the motion can be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). In evaluating the motion a court must draw all factual inferences and resolve all ambiguities in favor of the nonmoving party. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970); *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The record shows that both before trial and at the close of the evidence the matter was hardly "so one-sided that one party must prevail as a matter of law." In denying summary judgment the District Judge carefully noted the extensive evidence that the potential for violence was not as serious as that claimed by defendants. Pet. App. at B41 n.9. After trial the District Judge noted the "conflicting evidence as to whether the so-called 'Louima incident'

was a crisis which justified race-based transfers," Pet. App. at B66, as did the Second Circuit. Pet. App. at B17-18.

The conflicting evidence and the credibility determinations were for the jury to resolve. Over 40 witnesses testified at the trial. As the lower courts found, there was considerable evidence on which a reasonable jury could base a finding that in this case Petitioners did not establish their "operational needs" defense. The ruling of the Second Circuit affirming the denial of judgment as a matter of law, and finding ample evidence on which a jury could base its verdict, was plainly correct.

Finally, the Petitioners argue that the race-based assignments were "narrowly tailored." Pet. at 16-17. As the Second Circuit correctly concluded, however, Petitioners did not object to the jury charge on that issue, and, in any event, the issue was never reached by the jury. In rejecting the "operational needs" defense the jury found the Petitioners had failed to prove a compelling state interest for the race-based assignments. It therefore never reached the question of "narrowly tailored." Pet. App. at B20-21.

CONCLUSION

Because the "operational needs" defense was submitted to the jury as requested by the Petitioners, and there is plainly sufficient evidence in the record to support the jury's rejection of the defense, the record does not raise Question One. Similarly, the record does not raise Question Two. The petition, therefore, should be denied.

Respectfully submitted,

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